UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LORRAINE RANDALL, Plaintiff,	:	
v.	:	Civil Action No. 3:00CV1233 (CFD)
UNITED CEREBRAL PALSY ASSOCIATION OF EASTERN CONNECTICUT, INC. f/k/a UNITED CEREBRAL PALSY ASSOCIATION OF EASTERN CONNECTICUT, Defendant.	:	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Lorraine Randall, alleges that she was terminated from her employment because of a mental illness in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12100, et seq. On June 28, 2001, the defendant United Cerebral Palsy Association of Eastern Connecticut, Inc. ("UCPA") filed a motion for summary judgment. Randall, who had been represented by counsel when she initiated the suit, did not respond to the defendant's motion after making a pro se appearance and filing a number of motions for extensions of time. Despite Randall's failure to respond, this Court denied the defendant's motion for summary judgment on May 8, 2002. The ruling [Doc. # 28] indicated that when the adverse party does not respond to a motion for summary judgment, the proper course for the court is not to dismiss the case for failure to prosecute under Fed.R.Civ.P. 41(b), but rather to accept the moving party's factual assertions and decide the case on the merits. See LeSane v. Hall's Security Analyst, Inc., 239 F.3d 206, 211 (2d Cir. 2001). However, because UCPA had not

filed a Local Rule 9(c) statement,[1] it was not possible for the Court to determine what the defendant's factual allegations were. The ruling denying the MSJ was without prejudice to filing a new MSJ.

On May 16, 2002, UCPA filed a second motion for summary judgment, this time accompanied by a Local Rule 9(c)1 statement. See Def.'s Mot. for Summ. J. [Doc. #29]. After Randall did not respond to the new motion, this Court issued an Order on June 28, 2002, directing Randall to file a response by July 19, 2002 and indicating that her failure to do so would likely result in UCPA's summary judgment motion being granted. As Randall has not filed a response, the Court will address the merits of the summary judgment motion assuming that all of the factual assertions in UCPA's Local Rule 9(c)1 statement are true, pursuant to LeSane, 239 F.3d at 211.

I. Facts[2]

UCPA is a non-stock corporation that provides services to individuals with disabilities. UCPA employees go to the residences of individuals with disabilities to assist them with "medical, financial and social needs" in order to help them to live in a "non-institutional" setting. Individuals who receive these services from UCPA have the right to reject the employee assigned to them.

Randall began her employment with UCPA on February 16, 1997. In the fall of 1998, she was assigned to work with two UCPA clients. On October 16, 1998, Randall's supervisor informed her

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[1]The Local Rules of Civil Procedure for the District of Connecticut have recently been renumbered. Local Rule 9(c), which requires that a party filing a motion for summary judgment annex a document to its motion indicating in numbered paragraphs those facts as to which that party contends there is no genuine issue of material fact, is now known as Local Rule 56(a). However, because the record was created under the old numbering system, the Court will refer to the old rule number (9(c)) in this ruling.

[2]The following facts are taken exclusively from the defendant's Local Rule 9(c) statement.

that she was being reassigned, due to complaints UCPA had received from the two individuals to whom she had been assigned.

Randall did not return to work after being notified that she was being reassigned. After applying for unemployment benefits, and after submitting a number of doctor's notes indicating that she was unable to work, Randall applied for benefits under the long-term disability plan provided by UCPA and for social security disability benefits. In both applications, Randall indicated that she was "totally disabled" (such that she could not work) and that her period of total disability began on October 17, 1998. UCPA terminated Randall's employment by letter dated January 8, 1999. She received monthly payments from UCPA's long-term disability carrier until she reached the policy limits. She is currently receiving social security disability payments and remains unable to work, either because of her mental illness or because of the side effects of her medication.

II. Discussion

UCPA asserts that it is entitled to summary judgment because Randall's action was not timely under the ADA and because she has not made out a prima facie case of discrimination based on disability.

A. Statute of Limitations

Claims are time-barred under the ADA if they are not filed with the "Equal Employment Opportunity Commission ("EEOC") or the applicable state commission within 300 days. See Harris v. City of New York, 186 F.3d 243, 247 (2d Cir. 1999) (citing 42 U.S.C. § 2000e-5(e), incorporated into the ADA by reference in 42 U.S.C. § 12117(a)). Here, Randall filed her complaint with the Connecticut Human Rights and Opportunities Commission ("CHRO"), on November 16, 1999. Based

on Harris, UCPA asserts that Randall's claim with the CHRO did not fall within the statutory period because it was filed 312 after the issuance of her termination letter on January 8, 1999. However, a more careful reading of Harris suggests that Randall has 300 days to file a claim not from the date that a termination letter was mailed, but from the date when she "knew or had reason to know of the injury serving as the basis for [the] claim." Harris, 186 F.3d at 247 ("[W]e must determine when [plaintiff] knew or should have known that he had been passed over for promotion . . . . From that date he had 300 days to file his ADA complaint with the EEOC . . .").

The relevant inquiry under Harris is whether Randall filed her complaint with the CHRO within 300 days from the day that she "knew or should have known" that she had been terminated. Thus, the issue for the Court is whether Randall knew or should have known, prior to January 20, 1999, that UCPA had terminated her employment. If the answer to this question is yes, then her claim should be time-barred. UCPA's Local Rule 9(c) statement asserts that "Plaintiff was terminated by mail in a letter from Mr. Gary Lehrman, dated January 8, 1999." Def.'s Loc. R. 9(c) Stmt, ¶ 17. There is evidence in the record that supports this assertion. As to whether Randall actually received the letter before January 20, 1999, so that she "knew or should have known" that she had been terminated as of that time, Mr. Lehman attests in his affidavit that he recalls mailing the letter the day it was dated. Because the Court is required to assume that all the moving party's factual assertions are true under LeSane, the Court finds that the termination letter was mailed on January 8, 1999 and that Randall was therefore in receipt of the letter sometime prior to January 20, 1999. Thus, as Randall knew or should have known that she had been terminated more than 300 days before filing her complaint with the CHRO, on November 16, 1999, her action is not timely under the ADA and the defendant's Motion for Summary

Judgment [Doc. # 29] is GRANTED.

B. Prima Facie Case

Even if this Court had decided that the plaintiff's claim was not time-barred, the defendant is entitled to summary judgment on the merits of the ADA claim. Taking the factual assertions of UCPA as true under LeSane, the plaintiff has failed to make out a prima facie case of discrimination based on disability. "To make out a prima facie case under the ADA, a plaintiff must establish that: (1) his employer is subject to the ADA; (2) he was disabled within the meaning of the ADA; (3) he was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation; and (4) he suffered adverse employment action because of his disability." Giordano v. City of New York, 274 F.3d 740, 747 (2d Cir.2001). Here, based on the UCPA's factual assertions, Randall cannot establish that she was "otherwise able to perform the essential functions of her job."

In its Local Rule 9(c) statement, UCPA asserts that "[i]n her application for [social security] disability benefits plaintiff claimed that she was totally disabled and could not work" beginning on October 17, 1998. The defendant claims that, based on this assertion, Randall should be "judicially estopped" from claiming that she was "otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation." In Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999) the United States Supreme Court considered the relationship between a plaintiff's representations to the social security administration and a subsequent, seemingly inconsistent, ADA claim:

> This case asks whether the law erects a special presumption that would significantly inhibit an SSDI recipient from simultaneously pursuing an action for disability discrimination under the Americans with Disabilities Act of 1990(ADA), claiming that "with ... reasonable accommodation" she could "perform the essential functions" of her job. 42 U.S.C. S 12111(8).
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> We believe that, in context, these two seemingly divergent statutory contentions are often consistent, each with the other. Thus pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. *To survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could "perform the essential functions" of her previous job, at least with "reasonable accommodation."*

Cleveland, 526 U.S. 797-98 (emphasis added). See also Mitchell v. Washington Cent. Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999) (affirming grant of summary judgment where plaintiff's inconsistent statement regarding disability for purposes of SSDI judicially estopped him from making contrary claim in ADA case). Here, the plaintiff has not explained her inconsistent position, so she cannot survive summary judgment pursuant to Cleveland.

III. Attorney's Fees

In its motion for summary judgment, UCPA also asserts that it should be awarded attorney's fees. However, as the Second Circuit has cautioned, "*pro se* litigants in federal court should be granted greater leniency and patience than persons who are represented by counsel . . . and attorney's fees should only rarely be awarded against litigants proceeding *pro se*." See Spiegelman v. Reprise Records, 101 F.3d 685, at *1 (2d Cir. 1996) (citations omitted) (unpublished decision). Moreover the claims are not necessarily "frivolous" as UCPA asserts. Perhaps competent counsel would have been able to demonstrate that there was a genuine issue of material fact as to the date that Randall became

aware of her termination and would have been able to offer an explanation for her seemingly inconsistent position to the social security administration regarding her ability to perform the essential functions her job. In any event, Randall should not be punished for her inability to make that showing on her own. See Hughes v. Rowe, 449 U.S. 5, 15 (1980) ("An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims.")

IV. Conclusion

For the preceding reasons, the defendant's motion for summary judgment [Doc. # 29] is GRANTED and the case is DISMISSED. The defendant's motion for attorney's fees [Doc. # 29] is DENIED. The Clerk is directed to close this case.

SO ORDERED this ___ day of February 2003, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE